# In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 728.

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 427, AFL, *et al.*,

*Petitioners,*

vs.

FAIRLAWN MEATS, INC.,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

STANLEY DENLINGER,
1622 First National Tower,
Akron 8, Ohio,
*Counsel for Respondent.*

## INDEX.


History of Proceedings in the State Courts of Ohio ... 1

Facts Concerning Employer's Business ... 5

Discussion of Authorities ... 7

Conclusion ... 20


## AUTHORITIES CITED.

### Cases.


*Algoma Plywood vs. Wisconsin Board*; 336 U. S. 301 12

*W. E. Anderson Sons Co. vs. Local Union No. 311*, 156 Ohio State 541 ... 2

*M. L. Ashburn*, 88 N. L. R. B. 286 ... 18

*Betty and Bert Millage*, 87 N. L. R. B. 248 ... 19

*Brandeis vs. National Labor Relations Board*, 142 F. 2d 977, cert. den. 323 U. S. 751 ... 12

*Building Trades Council vs. Kinard Construction Company*, 346 U. S. 933 ... 12

*Bus Employees vs. Wisconsin Board*, 340 U. S. 383 ... 12

*Clothing Workers vs. Richman Bros. Company*, 348 U. S. 511 ... 12

*Consolidated Edison vs. National Labor Relations Board*, 305 U. S. 197 ... 17, 19

*Crosby vs. Rath*, 136 Ohio State 352 ... 2, 9, 10

*Federal Dairy Company*, 91 N. L. R. B. 638 ... 18

*Garman vs. San Diego Building Trades Council*, 291 Pac. (2d) 1 ... 10

*Garner vs. Teamsters Union*, 346 U. S. 485 ... 4, 12, 13, 17

*Grimes and Hauer, Inc. vs. Pollock*, 163 Ohio State 372, 350 U. S. 900 ... 4, 13

*Hague vs. C. I. O.*, 307 U. S. 515 ..... 7

*Harold and Sons*, 82 N. L. R. B. 174 ..... 19

*Hill vs. Florida*, 325 U. S. 538 ..... 13

*International Rice Milling Company vs. National Labor Relations Board*, 341 U. S. 665 ..... 13

*International Union vs. O'Brien*, 339 U. S. 454 ..... 13

*Kobritz*, 153 Fed. (2d) 8 ..... 18

*Labor Board vs. Seven-Up Company*, 344 U. S. 344 ..... 15

*Local Union No. 10 vs. Graham*, 73 Sup. Ct. 585 ..... 15

*Marsh vs. Alabama*, 326 U. S. 501 ..... 13

*May Potato Chips*, 86 N. L. R. B. 191 ..... 18

*Mine Workers vs. Coronado*, 259 U. S. 344 ..... 15

*National Labor Relations Board vs. Denver Building Council*, 341 U. S. 675 ..... 13

*National Labor Relations Board vs. Fainblatt*, 306 U. S. 601 ..... 14

*National Labor Relations Board vs. Fansteel Metallurgical Corporation*, 306 U. S. 240 ..... 8

*National Labor Relations Board vs. J. L. Hudson*, 135 Fed. (2d) 380 ..... 19

*Retail Clerks Local No. 1564 vs. Your Food Stores*, 225 Fed. (2d) 659 ..... 11

*Santa Cruz Company vs. Labor Board*, 303 U. S. 444 15

*United Hatters*, 208 U. S. 274 ..... 15

**Statutes.**

Ohio Revised Code Section 2505.31 ..... 3

# In the Supreme Court of the United States

**OCTOBER TERM, 1955.**

**No. 728.**

---

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 427, AFL, *et al.*,

*Petitioners,*

vs.

FAIRLAWN MEATS, INC.,

*Respondent.*

---

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

---

### HISTORY OF PROCEEDINGS IN THE STATE COURTS OF OHIO.

On February 8, 1954, Fairlawn Meats, Inc., an Ohio corporation, employing fifty (50) people in three (3) retail meat stores, filed its petition for injunction against the Butchers Local Union in Akron, Ohio.

The Union removed the cause to the United States District Court for the Northern District of Ohio and on the motion of Fairlawn Meats, Inc. to remand, on March 18, 1954, the United States District Court found "that there are no allegations made in the plaintiff's petition showing a Federal question, or from which a Federal question may be inferred, and, therefore, finds this Court is without jurisdiction, and hereby sustains the motion to remand."

The Union then filed an amended answer, admitting the corporate structure and location of the stores. All

other allegations were denied. It also set up the defense of lack of jurisdiction of the Common Pleas Court and the further defense of estoppel by reason of a stipulation signed May 10, 1952.

Fairlawn filed its reply, alleging the stipulation was without consideration, and denied that the National Labor Relations Board had sole and exclusive jurisdiction.

On the issues thus made, the case went to trial in the Common Pleas Court. Both parties offered many witnesses and after the matter was fully gone into, judgment was rendered in Fairlawn's favor.

The Union then filed its appeal to the Court of Appeals of Summit County, Ohio, where by stipulation of the parties, the Union's appeal on questions of law and fact was heard on the record of the evidence in the Court of Common Pleas. The Court of Appeals hearing the cause de novo made its findings of fact as well as law. On all the evidence received, it found among other things:

(a) "that there is no burden placed upon, or obstruction of, interstate commerce by any action taken by the parties to this case." and

(b) "therefore, that the state courts have jurisdiction to hear the case."

(c) "the picketing was for organizational purposes only, and not to secure a settlement of grievances."

(d) the picketing in part was done on land owned by or under lease to Fairlawn.

It, therefore, concluded that under the announced policy in Ohio as set forth by Ohio Supreme Court in *Crosby v. Rath,* 136 Ohio State 352, and in *W. E. Anderson Sons Co v. Local Union No. 311,* 156 Ohio State 541, that injunction should be granted and it so ordered on June 4, 1955.

From this Order, the Union filed its motion in the Ohio Supreme Court to certify the record and appeal as of right. In the Ohio Supreme Court the Union raised two questions only, both on its motion to certify and for a rehearing. As stated by the Union, these questions are:

> (1) Is peaceful picketing for a lawful objective, arising out of a bona fide trade dispute between an employer and a union representing its employees subject to injunctive restraint? and
>
> (2) Is the controversy of a corporate employer engaged in an industry and in a labor dispute affecting commerce, seeking injunctive relief against a union to restrain peaceful picketing, alleged in fact, and to be for a purpose violative of the Act within the exclusive jurisdiction of the National Labor Relations Board?

In both questions, the Union presented to the Ohio Supreme Court ingredients which have been resolved against the Union by the findings of the two trial courts after hearing all the testimony and evidence. By Ohio Revised Code Section 2505.31, it is provided the Supreme Court of Ohio is not required to determine as to the weight of the evidence, and, consequently, the established practice is for the Court to refuse to weigh the evidence:

> (a) To determine its sufficiency, or
>
> (b) To determine where the preponderance lies, or
>
> (c) To determine whether correct conclusions as to the facts were reached by the Court below.

On November 9, 1955, the Supreme Court of Ohio found no debatable constitutional question was involved and denied the motion to certify. The Union then filed a motion for rehearing in which it states the questions involved are:

(1) In refusing appeal this Court allows a Court of Appeals decision to stand which is in conflict with *Grimes and Hauer, Inc. vs. Pollock, et al.*, 163 Ohio State 372, in controversies coming within the provisions of the National Labor Relations Board and which affect commerce.

(2) In refusing appeal this Court allows a Court of Appeals decision to stand which denies to employees the right to strike to redress their grievances with their own employer.

(3) In refusing the appeal this Court allows the erroneous judgment of the lower court to stand on matters of great public interest and concern without settling important questions of Ohio law presented by this appeal.

Here, again the Union seeks answers to questions not before the Court. In the *Grimes* case, *supra*, the petition of Grimes and Hauer, Inc. alleged it was involved in interstate commerce. The Supreme Court of Ohio followed the *Garner* case in this Court in reaching its decision in *Grimes and Hauer, Inc.*, but in the case at bar, the Federal Court and two trial courts found as a fact no Federal question was involved.

Consequently, the Ohio Supreme Court was entirely correct in stating that no debatable constitutional question was involved. Furthermore, the "right to strike" was in no manner, at any time, a question before the Federal or State Courts and when the Union presented for the first time the question of right to strike on a rehearing motion, the Ohio Supreme Court was clearly correct in denying the motion for rehearing. Particularly so, in view of the fact that no order of any kind on this subject had been made.

**FACTS CONCERNING EMPLOYER'S BUSINESS.**

1. Fairlawn Meats, Inc. is an Ohio corporation, whose sole stockholders are Burdett H. Ekers and Nina E. Ekers, husband and wife, residents of Summit County, Ohio. The Company is not licensed to do business in any other state and is not a subsidiary of any other company or corporation.

2. The respondent employs fifty (50) men and women in the operation of *retail* selling food products, consisting of fish, fowl, meat, bread and groceries. For this purpose, two storerooms are leased and one owned in Summit County, Ohio:

(1) 278 West Avenue, Tallmadge, Ohio

(2) 2246 West Market Street, Akron, Ohio

(3) At junction of United States Route Number 21 and State Route Number 176 in West Richfield, Ohio.

Its purchases are all made within the State of Ohio. It has no mail order business and its entire sales are made within the State of Ohio. In excess of sixty-five (65) per cent of the sales are across the counters of the stores, the balance being delivered to restaurants or markets within the environs of Summit and Cuyahoga Counties, Ohio. Plaintiff does no butchering and does not have any Federal meat inspection. No warehouses are involved.

3. The following companies originate their shipments to respondent from points wholly within the State of Ohio:

| | |
|---|---|
| Allied Wholesale | Superior |
| Akron Poultry | Akron Packing |
| Capital City Products | Canton Provision |
| Alex Fair | Swift and Company |
| Schwenger-Klein | Slade-Gorton |
| Myers | Sucher |
| Lee Anodic and Son | Warsaw Sausage |

| | |
|---|---|
| Tasty Pure Food | Armour |
| Pringles Meats | Ritchie |
| Christ Wengel | Hildebrandt |
| Copley Pack | Klein Sea Foods |
| Pesta Foods | David Davies |
| Kent Provision | Olesky |
| Galat Packing | Lee Meats |
| Petit | Five Points Poultry |
| Sugardale | Telling Ice Cream |
| Peerless | Glen Brook Foods |
| Gibbs | Aster Meats |

and many others. The purchases from these firms wholly within the State of Ohio are Seven Hundred Fifty Three Thousand Ninety Nine Dollars and Ninety Four Cents ($753,099.94) annually.

4. In addition thereto, the following packing houses ship to plaintiff from without the State of Ohio:

| | |
|---|---|
| International Mineral | Hormel and Company |
| Griffith Laboratories | Wilson and Company |
| Hafner Coffee | Hunter Packing |
| Case International | B. Heller |
| Rath Packing Company | Oscar Mayer |
| Marhofer Packing Company | Dubuque Packing |
| Miller and Miller | Cudahy |

The foregoing packers maintain a local representative in Summit County, Ohio. These representatives call upon plaintiff at its stores, at which points orders are placed by plaintiff for meat. Shipments are then made, freight paid by shipper, on those orders by way of rail or truck to plaintiff's stores, at which points checks are issued locally to the packers' representatives and the proceeds thereof banked in Akron banks to the packers' account by the packers' representatives.

5. The Company reports to the Bureau of Unemployment Compensation of Ohio, contributes to the State Work-

men's Compensation Fund, but reports only tax reports and Social Security to the Federal Government.

6. Advertising for sale of respondent's foods is made wholly in the Akron Beacon Journal. No advertising is done on a State or National scale and no radio or television medium is used.

## DISCUSSION OF AUTHORITIES.

The Union, in this Court, brings attention to various articles on "Shopping Centers" in the suburbs of American cities. The case at bar does not involve a shopping center. There is no dispute that Fairlawn's stores were either owned in fee or on leased lands in proximity of shopping centers and that this proximity as in all similar cases is furnishing a competition that is rapidly diminishing its business to the extent that at this time only one of the three original stores remains in business.

The right to picket as constituting a privilege bestowed upon a citizen by the Constitution has been the subject of consideration by this Court many times. We would here for the moment not become involved in the right, but discuss rather the "*place* of picketing." It has been quite well understood that the employer in no instance is required to furnish the picketeer a place to march or a platform from which he might exercise his freedom of speech.

This Court in *Hague vs. C. I. O.*, 307 U. S. 515, held the privilege of a citizen of the United States to use the *streets* (emphasis ours) for communication of views on national questions may be relegated in the interest of all; it is not absolute, but relative and must be exercised in subordination to the general comfort and convenience and in consonance with peace and order; but it must not in the guise of regulation be abridged or denied.

Picketing *at* the situs of a labor dispute offers no reason for picketing *on* the premises of the employer. A question has arisen at times where the Court is asked to rule on picketing away from the situs of the labor dispute. One may picket at the employer's place of business but not on his premises. Otherwise, pickets could leave the street, enter the gates of factories and through the doors of stores and march up and down the aisles with their banners. To permit such conduct would return us to the days of the "sit down strike," where the picketeer took over and reduced the employer's property to his possession. This has been uniformly outlawed by state and federal Courts and final word was received from this Court when it spoke in *National Labor Relations Board vs. Fansteel Metallurgical Corporation,* 306 U. S. 240.

The usual picketing scene anywhere presents conditions, which are quite different from the views expressed and hopes to be attained by the picket. While the right of free speech may permit the marching to and fro *before* my premises with a banner containing assertions that I am "unfair to organized labor," certainly it does not permit the marching to and fro *upon* my premises. The Labor Management Relations Act prevents interference by the employer with the right of employees to organize and bargain collectively, but it does not require him to furnish the forum or the platform from which the employee may exercise his right to organize and his right to free speech except when the employer refuses to give a rival union the privilege he has voluntarily extended to a union he favors.

Traditionally State Courts have had and have exercised their full jurisdiction to enjoin trespass. No matter how peaceful and lawful in purpose and conduct picketing may be, it is enjoinable when conducted *on* the property

of the employer and not on the public streets or places where the picket has the right to be.

In the State Court proceeding, the following propositions govern:

(1) The trial courts had the inherent right to pass upon the facts and determine the jurisdiction of the matters before it.

(2) The Ohio Supreme Court will not weigh the evidence.

(3) Since each case of picketing must be determined on its own facts, there is no necessity for the Ohio Supreme Court to further clarify its position.

(4) No conflict existed between the decision of the Court of Appeals of Summit, Mahoning and Butler Counties.

*Crosby vs. Rath* is the law of Ohio governing picketing in a business which does not affect commerce and has not been modified by the many decisions of this Court on this subject. By many it was thought that inasmuch as there was violence in the picketing in the *Crosby* case, that certiorari was refused and that when the violence ceased, the United States Supreme Court would grant certiorari. Following denial of the first petition for certiorari in the *Crosby* case, the Union filed its motion to modify the decree so as to permit peaceful picketing because all violence, and in fact, all picketing in its effect had ceased for three years.

A second petition for a writ of certiorari was filed and the Union argued that all violence had ceased and that the forbiddance of peaceful picketing by an Ohio Court was violating the right of free speech. It was argued that the defendants were in the same position as were the defendants in the *Senn* and *Swing* cases and that if the United States Supreme Court denied certiorari as to violence in

the *Meadowmoor* case, then the *Crosby* decree must be modified so as to permit peaceful picketing. This second petition for a writ was denied May 25, 1942 (136 U. S. 688).

The California Court has more recently held in *Garmon vs. San Diego Building Trades Council*, 291 Pac. (2d) 1, that in an action in the state court to enjoin picketing the evidence supported the finding that the purpose of the picketing was not to induce the employees to join, but to compel the employer to sign an agreement requiring union membership or suffer destruction of the business. In the case at bar, the trial court found that the purpose of picketing was to coerce the employer into signing an agreement requiring union membership. Now the mere fact that the acts and conduct of a purely local business may constitute acts and conduct which if engaged in an interstate commerce business would be an unfair labor practice under the Act, does not exclude the State Courts from calling the act and conduct which it is under the State law and enjoin its further perpetration.

The numerous cases cited by the Union on the question of jurisdiction deal with the enforcement of the Board's order. Having assumed jurisdiction, the decision of the Board reached by the facts as to the *jurisdiction* of the Board has been upheld by the Federal Courts and by this Court. With these decisions we have no quarrel.

With equal sincerity we maintain the decision of a court of last resort in a state as to its finding of facts bearing on jurisdiction deserves the same respect and is binding unless it clearly conflicts with a Federal statute or decision. Certainly, we may not expect that State Courts will take jurisdiction where they should not any more than we should expect the Labor Board to refuse to take jurisdic-

tion. In any event, this case does not present a conflict with any Federal Act or decision and is not the enforcement of any state provisions which have been preempted by Federal legislation nor in asserting a concurrent jurisdiction with the Federal Government.

*Retail Clerks Local No. 1564 vs. Your Food Stores*, 225 Fed. (2d) 659, helps Fairlawn rather than the Union. In this case the employer filed suit in the state court seeking an injunction against compulsion to engage in an unfair labor practice. Thus he pleaded himself out of court in the very beginning. But the State Court action was removed to the Federal Court along with the temporary injunction which had been issued. No motion to remand was filed, but the Union's motion to dismiss the petition and temporary order was granted on the ground the United States District Court had no jurisdiction. The National Labor Relations Board refused jurisdiction because interstate operations did not meet the standards for the assertion of jurisdiction. Then the employer filed his second suit in the State Court based on trespass. The defense of res adjudicata was sustained. On page 663, the Court said:

> "By the motion to dismiss and dissolve the temporary restraining order, the question of both state and federal jurisdiction was placed at issue and the subsequent dismissal amounted to an adjudication of this jurisdictional feature."

In this connection, it is well to note that in the case at bar, on the motion to remand, the Court sustained the motion on the ground the Federal Court had no jurisdiction. Is this res adjudicata? The only difference seems to be that in the *Retail Clerks* case, the order is final from which appeal may be made and in the case at bar, the order to remand is not appealable to the Circuit Court.

In *Clothing Workers vs. Richman Bros. Company*, 348 U. S. 511, a question of right of a Federal Court to enjoin proceedings in a state court was raised resulting in this Court holding the Federal Court had no such power.

*Algoma Plywood Company vs. Wisconsin Board*, 336 U. S. 301, presents facts where the employer is admittedly a manufacturer producing goods for interstate commerce in a plant in which the National Labor Relations Board had certified the Union as bargaining representative after a Board decision. No question of jurisdiction could be sincerely urged.

Likewise in *Bus Employees vs. Wisconsin Board*, 340 U. S. 383, the Railway Company was clearly engaged in interstate commerce. A union shop election had been conducted by the National Labor Relations Board after a representative election was held.

In *Brandeis vs. National Labor Relations Board*, 142 F. 2d 977, certiorari denied 323 U. S. 751, the Eighth Circuit sustained the National Labor Relations Board's position that it had jurisdiction under the Act where seventy-five (75) per cent of the merchandise purchased and shipped to the employer engaged in Eight Million Five Hundred Thousand Dollar ($8,500,000) business and did affect the flow of interstate commerce.

In *Building Trades Council vs. Kinard Construction Company*, this Court granted certiorari and reversed the State Court, 346 U. S. 933 (January 18, 1954). This Court followed *Garner v. Teamsters Union*, but did not pass upon the question whether the State Court could grant its own relief should the Board decline to exercise its jurisdiction. The effect on interstate commerce was unquestioned.

In *Garner vs. Teamsters Union*, 346 U. S. 485, again admittedly:

> "Petitioners were engaged in Pennsylvania in an interstate trucking business."

In *Grimes & Hauer, Inc. v. Pollock*, 163 O. S. 372, 350 U. S. 900, again admittedly Grimes & Hauer, Inc. were engaged in interstate commerce by the allegations of plaintiff's petition.

In *Hill v. Florida*, 325 U. S. 538 (June 11, 1945), the Florida Statute attempted to license a union "business agent," and ran afoul of the National Labor Relations Act, by being wholly inconsistent with the "full freedom of choice of collective bargaining agents" and attempted to fix the agents functioning by conditions fixed by Florida.

In *International Rice Milling Co. v. National Labor Relations Board*, 341 U. S. 665, the mill was engaged in interstate commerce and the question involved was "did the conduct violate the secondary boycott provisions of the Act."

In *International Union vs. O'Brien*, 339 U. S. 454 (May 8, 1954), the problem is the Strike Vote provisions of the Michigan Mediation Law. This Court found they were in conflict with the National Labor Relations Act and are therefore invalid under the Commerce Clause of the Federal Constitution.

*Marsh vs. Alabama*, 326 U. S. 501 (January 7, 1946), presents the proposition that a state may not remove the freedom of religion and the press by legislation inconsistent with the First and Fourteenth Amendments of the Federal Constitution.

In *National Labor Relations Board vs. Denver Building Council*, 341 U. S. 675 (June 4, 1951), purchases were

Eighty-six Thousand Five Hundred Dollars ($86,500.00) raw materials of which Fifty-five Thousand Seven Hundred Forty-five Dollars ($55,745.00) were from out of the state. Both the Board and the Court of Appeals found the strike affected commerce. This Court said:

> "de minimuo non curat lex did not require the Board to refuse jurisdiction. The Board's findings on the questions of fact are conclusive."
>
> "Activities complained of must affect interstate commerce in order to bring them within the jurisdiction of the Board. The Board here found that their effect was sufficient to sustain its jurisdiction."

*National Labor Relations Board vs. Fainblatt,* 306 U. S. 601 (April 17, 1938). This is a case, where the Board had taken jurisdiction, issued its complaint, conducted a hearing, resulting in a decision. Commerce was affected. Respondents are located in New Jersey. Materials were furnished by a partnership located in New York City; cloth was cut in New York, shipped to New Jersey; suits were made up in New Jersey and shipped back to New York, and were sold out of New York to customers throughout the United States.

At page 605, the Court said:

> "Here interstate commerce was involved in the transportation of the materials to be processed across state lines to the factory of the respondent and in the transportation of the finished products to points outside the state for distribution to purchaser and ultimate consumers."

At page 606:

> "Transportation alone across state lines is commerce within the Constitutional control of the national government and subject to the regulatory power of Congress—"

and,

"it extends to all such commerce be it great or small."

*Labor Board vs. Seven-Up Company*, 344 U. S. 344 (January 12, 1953). Here the National Labor Relations Board issued a complaint, conducted a hearing and computed back pay in a discriminatory discharge matter. The Company could not raise the objection based on seasonable nature of its business before this Court when it had not urged it before the Court of Appeals or Board.

In *Santa Cruz Company vs. Labor Board*, 303 U. S. 444, decided March 28, 1938, the Corporation canned fruit raised in the state and disposed of thirty-seven percent (37%) of its output beyond the State. National Labor Relations Board accepted a charge and issued a complaint and order regarding discharged employees.

The Court quite properly held the strike would prevent sales which were made outside the State.

But in the case at bar, the strike would be to prevent sales to ultimate consumers wholly in Ohio by a retailer in Ohio, who makes no sales outside the State of Ohio.

*United Hatters*, 208 U. S. 274, is aimed at the destruction of *interstate* trade in manufactured hats.

*Mine Workers vs. Coronado*, 259 U. S. 344. Coal Mining is not a case of interstate commerce, but in the Second Case, 268 U. S. 295, evidence was adequate to show the purpose was to stop production of non-union coal and prevent its shipment to other states. This rule is for manufacturers and processors.

The Supreme Court, in *Local Union No. 10 v. Graham*, 73 Sup. Ct. 585, decided March 16, 1953, granted certiorari "because of the importance of the issue in the practical administration of labor law," page 587 of the Opinion. Although the extent of the damage was only $190.00, the

Court said that the picketing was "for aims, purposes and objectives in conflict with the provisions of the Right to Work laws of the State of Virginia, and therefore, illegal."

"Picketing—May be enjoined if purpose is in violation of state law—Local Union No. 10 v. Graham, 73 S. Ct. 585. General contractor, under contract with City of Richmond, to construct high school, complained that defendants picketed the plant in admittedly peaceful fashion, to induce said contractor to take action in violation of the Virginia Right to Work Statute by precluding non-union employees on the job. Affirming the Supreme Court of Appeals in Virginia in sustaining an injunction issued by the Trial Court, a 7-justice majority opinion, Mr. Justice Burton, held, that the evidence justified the trial court's finding that the enjoined picketing was for purposes in conflict with the Virginia Right to Work Statute and that Virginia could, consistently with the Fourteenth Amendment to the Federal Constitution, enjoin peaceful picketing when carried on for purposes in conflict with that statute. The Court felt that the result followed from the 'reasoning and authority of many prior cases which it reaffirmed, including Giboney v. Empire Storage Co., 69 S. Ct. 684, 336 U. S. 490, 93 L. Ed. 834, and others. Mr. Justice Black dissented without opinion, and Mr. Justice Douglas wrote a dissenting opinion, being willing to confirm the State's police power as established in the above case but unwilling to support the broad injunction in the instant case.'

"Picketing—No appeal from State Court's temporary injunction—*Montgomery Bldg. and Construction T. C. vs. Ledbetter Erection Co.*, 73 S. Ct. 196. A-72 majority, Mr. Justice Minton refused to review temporary injunction order of Supreme Court of Alabama issued to enjoin certain picketing activities, wholly peaceful, by petitioner labor organizations reasoning that the Court could review on certiorari only a 'final judgment or decree' under 28 United States Code

Annotated Section 1257. The majority said that the argument that 'to await the outcome of the final hearing is to moot the question and to frustrate the picketing,' however appealing, 'does not warrant us in enlarging our jurisdiction. Only Congress can do that.' Mr. Justice Douglas, with whom Mr. Justice Black concurred, dissented, saying, 'Unless the rule of finality is to be purely mechanical, which to date it has not been * * * we should determine now whether the National Labor Relations Act permits a state court to interfere with a labor controversy in a way which, though interim in form, irretrievably alters the status of the dispute or in fact settles it.'"

Neither *Graham* nor *Ledbetter* cases, decided shortly before the *Garner* case, were overruled by the *Garner* case.

In an early case, the Supreme Court of the United States in *Consolidated Edison v. National Labor Relations Board,* 305 U. S. 197 (1938) held the mere fact one is a retailer does not exempt one from the operation of the Labor Relations Act; nor is the question simply one of engaging in interstate commerce but rather is will the existing strife result in "*substantial interference* to or interference with the free flow of commerce." Thus we are confronted with the much broader scope of the interstate commerce problem than was experienced by the Court and counsel when the law professors taught the subject to us more than thirty years ago. Be that as it may, the National Labor Relations Board, cognizant of this pronouncement and dealing with the broader problem: "affecting interstate commerce" has established certain principles and criterion to deal with this question. They recognized that, even under the principles pronounced Congress had not taken the entire area of labor relations and preempted it for the jurisdiction of the Board. They are limited to em-

ployers and employees, whose activities substantially interfere with interstate commerce.

The Labor Board has, therefore, adopted a "Volume of Business Test" to each set of facts in dealing with the question. This is not based on budgetary considerations. They say that where the "direct interstate purchases are less than One Million Dollars ($1,000,000.00) annually" or "Two Million Dollars ($2,000,000.00) in indirect interstate purchases," where the interstate sales do not exceed Fifty Thousand Dollars ($50,000.00), jurisdiction will not be assumed or taken. On this basis they declined jurisdiction in the case of:

*Federal Dairy Company*, 91 N. L. R. B. 638, decided October 3, 1952,

with the words: "We decline jurisdiction where the direct inflow is less than Five Hundred Thousand Dollars ($500,000.00) annually."

Applying the same rule in the *Kobritz* case, 153 Fed. (2d) 8, in 1951, they stated, "meat and allied products in excess of One Million Dollars ($1,000,000.00) from outside the state gives the Board jurisdiction." In this case, Kobritz was a *wholesale purchaser* and *distributor* of meat and provisions, purchasing annually One Million, One Hundred Seventy-eight Thousand, Six Hundred Sixty-seven Dollars and Twenty-eight Cents ($1,178,667.28) worth of provisions shipped to it by rail and truck from points outside the State of Maine.

On the basis of the relative remoteness on the impact on interstate commerce, they declined to take jurisdiction in:

*M. L. Ashburn*, 88 N. L. R. B. 286
(Sale of oysters);
*May Potato Chips*, 86 N. L. R. B. 191
(Potato Chip Manufacturing);

*Harold and Sons*, 82 N. L. R. B. 174
(Poultry and eggs);
*Betty and Bert Millage*, 87 N. L. R. B. 248
(Food Store).

The enormity of the inflow is recognized in a Sixth Circuit Court case, *National Labor Relations Board vs. J. L. Hudson*, 135 Fed. (2) 380. J. L. Hudson Company is one of Detroit's largest department stores. As described by the Board and Court, it is "enormous"; five warehouses are involved; 3562 employees; expansive *public* service; more than Thirty-five Million Dollars ($35,000,000.00) of its Forty-three Million, Six Hundred Eighty-four Thousand, Two Hundred Eighty-nine Dollars ($43,684,289.00) annual purchases came from outside the state; its products came from all parts of the world to suit the taste of the most fastidious to the most lowly section hand; it had a mail order department which shipped to all states a very substantial dollar volume; and its sales totaled over Seventy-one Million, Six Hundred Eighty-nine Thousand, Seven Hundred Thirty-seven Dollars ($71,689,737.00). impact of the closing of an operation of this type upon interstate commerce is apparent.

These landmarks indicate that the Board and the Courts do not attempt to single out the small operator and apply a hard rule to bring him within its jurisdiction. Furthermore, the Labor laws contemplate a "substantial interference with interstate commerce." Where this is lacking, the little fellow must seek his relief in the tribunals of his state and community. This is a just and good rule.

The United States Supreme Court in the *Consolidated Edison* case, *supra*, pronounced the old adage that in cases in which the question of interstate commerce arises each tub must set on its own bottom, or each individual case

must be decided on the facts of that case. Applying this thought to the case at bar, truly the plaintiff is not engaged in interstate commerce and interstate commerce is not affected.

## CONCLUSION.

The mere assertion of the Union that Ekers is in interstate commerce was insufficient. The trial court decided this question adversely to the Union on the evidence presented, and did so by applying the ordinary rule of proof by a preponderance of the evidence.

We have pointed out the fact regarding the National Labor Relations Board cases because the *Board has taken jurisdiction* in the cases referred to and were in Court to protect that jurisdiction and the orders they made pursuant thereto. But here as stated *supra*, the Union does not seek the Board's jurisdiction, but boycott the very agency, which they claim ousts the jurisdiction of the trial Court. As Judge McNamee of the Federal Court said, "you present the anomalous position in Federal Court of *asking* this Court to take *jurisdiction* in order that you might then *ask* me to dismiss the petition on the ground the Court *does not have* jurisdiction."

It appears to us that it is most illogical to claim that because an Ohio meat packer bought a steer in Wisconsin which was shipped to Ohio and butchered in Ohio and sold here, that without showing the butchered steer came to rest on Ekers' counter, Ekers will affect interstate commerce if he ceases to buy from this particular packer because of a strike.

Furthermore, the type of business is to be considered. A retail store selling food only locally is distinguishable from a manufacturing employer, shipping his manufactured product to another state or from a telephone com-

pany providing property protection service by means of a group of corporate subsidiaries engaged in providing similar services in several states.

The undisputed facts showed the trial Courts clearly that whether Ekers makes his employees join the Union by signing the proposed Union Contract, or maintains he has no right to do so and, therefore, will not force them into the Butchers Union will have *no* impact, effect or relation to or on the business of the packers, or the steer-raising farmers of other states.

The Writ should be denied.

Respectfully submitted,

STANLEY DENLINGER,

*Counsel for Respondent.*